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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D. C. 20301

19 March 1971

MEMORANDUM FOR THE GENERAL COUNSEL, CIA

Larry:

Attached is a modification of the second half of your draft letter on S. 596. This is based upon three considerations:

✓ 1. I suggest omission of the reference to Article 102 of the U. N. Charter. The reason is that the Committee might well take offense at being compared to an international organization from the security standpoint.

2. Defense has consistently disagreed with the State Department position that to avoid the legislation the Executive Branch should commit itself to make available classified agreements, or information concerning them, on an informal basis. The reason is that we are not willing to make available information with respect to some types of agreements, particularly those relating to strategic plans, which are peculiarly within the purview of the President as Commander in Chief and as the instrument of the Government in matters of foreign relations.

3. I have added the clearance paragraph with respect to Office of Management and Budget because I think this adds a note of solidarity.

J. Fred Buzhardt
J. Fred Buzhardt

Attachment - 1

OSD REVIEW COMPLETED

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DRAFT

19 March 1971

Dear Mr. Chairman:

The Secretary has asked me to reply to your letter of February 11, 1971 requesting our comments on a bill, S. 596, which would require the transmission to the Congress of international agreements other than treaties to which the United States becomes a party.

The Executive Branch agrees with the general purpose of this bill, which we understand is to insure that the Congress is appropriately informed of the conclusion by the United States of new international agreements if it is to carry out properly its constitutional responsibilities. However, in order to accomplish that purpose, we do not believe that legislation is either necessary or desirable.

Basically, legislation of this nature poses a significant constitutional problem as between the Executive Branch and the Congress.

The history of this problem goes back to the beginning of our Government and is well reviewed in Committee Prints of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, in 1958 and 1959, entitled, "The

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Power of the President to Withhold Information From the Congress."

These documents present the considered views of the Attorney General and give the history and the legal implications in great detail. The Attorney General's conclusion is summed up as follows on pages 3 and 4:

"...And any law passed by Congress, designed to compel the production of papers by heads of departments would necessarily have to comply with the constitutional requirement that the President is as supreme in the duties assigned to him by the Constitution, as Congress is supreme in the legislative functions assigned to it. In other words, Congress cannot, under the Constitution, compel heads of departments by law to give up papers and information, regardless of the public interest involved; and the President is the judge of that interest. . . ."

There is no question about the need for a full flow of information between the Executive and Legislative Branches of our Government which is not limited to international agreements. The Executive Branch is prepared to provide to the Legislative Branch the information which it requires for the performance of its constitutional function. However, we believe that the requirements of the two branches can be met by mutual confidence and cooperation and not by legislation which raises a serious constitutional issue.

For the reasons stated herein, the Department is opposed to enactment of S. 596.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Copy to Ambassador Coerr 3/19/71 - LDX